Supreme Court, U. S.
FILED
OCT 18 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1978

No. 78-465

FRANK D. NAPOLITANO and
NORMA NAPOLITANO, Appellants,

vs.

WYOMING STATE HIGHWAY DEPARTMENT
AND STATE HIGHWAY COMMISSION,
Appellees

MOTION TO DISMISS

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The Appellees move the Court to dismiss the appeal herein on the grounds that it does not represent a substantial federal question and that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on.

I

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of Section 9-2-332, Wyoming Statute, 1977.

> This statute states:"Persons having claims against the state shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled and allowed, within one year after such claim shall accrue, and not afterward."

B. The Proceedings Below

Appellants and Appellees entered into an agreement for

the purchase of certain land for highway right of way. By mutual agreement the purchase price and attending construction conditions were agreed upon by the parties. During the course of construction Appellants contended that the highway was being constructed contrary to their agreement and understanding. When Appellees refused to pay damages or make construction changes, Appellants brought an inverse condemnation action. Appellees defended, among other defenses, the application of Section 9-2-332, Wyoming Statutes, 1977, which, in effect, required the submissions of claims to the state auditor within one year after a claim accrued. The lower court held that such a claim was filed in time and subsequently awaded Appellants damages. Appellees appealed to the Wyoming Supreme Court on the grounds that the lower court committed error in finding a claim had been filed within one year's time with the auditor. The Wyoming Supreme Court reversed the lower court. On motion for rehearing, appellants for the first time raised the applicability of the Fifth and Fourteenth Amendment to the United States Constitution. The motion was denied by the Wyoming Supreme Court and Appellants filed their direct appeal to this court under the provisions of Title 28, U.S. Code, Section 1257(2).

II

ARGUMENT

Inasmuch as the federal question sought to be reviewed herein was not timely or properly raised in the state courts, there is no federal question for this court to consider. In *Cardinale v. Louisiana*, 394 U.S. 437, 22 L. Ed. 2d 398, 89 S. Ct. 1162 this court said:

> "Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or used upon in the state courts below. It was very early esablished that the Court will not decide federal constitutional issues raised here or the first time on review of state court decisions. In Crowell v. Randell, 10 Pet 368, 9 L Ed 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v Norwood's Lessee, 5 Cranch 344, 3 L Ed 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20, Sec. 25, 1 Stat 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet 368, 391 L Ed 458, 467. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, Miller v Nicholls, 4 Wheat 311, 315, 4 L Ed 578, 579 (1819), and since, e.g. Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc., 360 US 334, 342, n. 7, 3 L Ed 2d 1280, 1286, 79 S Ct 1196 (1959); State Farm Mutual Automobile Ins. Co. v. Duel, 324 US 154, 160-163, 89 L Ed 812, 817-819, 65 S Ct 573 (1945); McGoldrick v. Compagnie Generale Transatlantique, 309 US 430, 434-435, 84 L Ed 849, 851-852, 60 S Ct 670 (1940); Whitney v. California, 274 US 357, 362-363, 71 L Ed 1095, 1100, 1101, 47 S Ct 641 (1927); Dewey v Des Moines, 173 US 193. 197-201, 43 L Ed 665, 667-668, 19 S Ct 379 (1899); Murdock v City of Memphis, 20 Wall 590, 22 L Ed 429 (1875).
>
> 'In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 USC Sec. 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, O'Connor v Ohio, 385 US 92, 17 L Ed 2d 189, 87 S Ct 252 (1966), they should be given the first opportunity to consider them.
>
> "In view of the petitioner's admitted failure to raise the issue he presents here in any way below, the failure of the state court to pass on this issue, the desirability of giving the state the first opportunity to apply its statute on an adequate record, and the fact that a federal habeas remedy may remain if no state procedure for raising the issue is available to petitioner, the writ is dismissed for

want of jurisdiction."

See also *Tacon v. Arizona*, 410 U.S. 351 (1973); Annotations found in 49 L. Ed. 414, 67 L. Ed 557, 79 L. Ed. 1539. Cases are legion that state this principle. One case representative of this principle is *Mellon v.O'Neil*, 275 U.S. 213, 72 L. Ed. 245 (1927) wherein the court said:

> "It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on writ of error, unless it affirmatively appears upon the face of the record that a federal question consitituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. Whitney v. California, 274 U.S. 357, 360, 71 L. ed. 1095, 1099, 46 Sup. Ct. Rep. 641; [215] and cases cited It is not enough that there may be somehwere hidden in the record a question which if it had been raised would have been of federal nature. Dewey v. Des Moines, 173 U.S. 193, 199, 43 L. ed. 665, 666, 19 Sup. Ct. Rep. 379; Keokuk & H. Bridge Co. v. Illinois, 175 U.S. 626, 634, 44 L. ed. 299, 302, 20 Sup. Ct. Rep. 205; Whitney v. California, supra, 362.

Appellants nowhere in their brief point out where they raise such federal question properly or timely in the state lower or appellate courts. The only reference to the question was made in their Motion for Rehearing. Appellant's Appendix, p. 22a. The court's order denying the motion in no way touched the federal question. Appellant's Appendix, p. 25a.

"The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides." *Herndon v. Georgia*, 295 U.S. 443 (1935). *Chicago, Indianapolis, & Louisville Railway Company v. McGuire, et al*, and annotation thereto. 196 U.S. 128 (1905).

In the State of Wyoming a party is bound by the allegations of his petition, *Pardee v. Kuster*, 91 P. 836, 15 Wyo. 368, and is bound by his theory of the cause in its logical sequence. *State v. Schnitzer*, 95 P. 698, 16 Wyo. 479 (1908). Generally questions not going to the jurisdiction of the trial court and not raised in the trial court will not be considered on appeal. *Neu v. Grant*, 548 F. 2d 281 (1977), 10 Wright &

Miller, Federal Practice and Procedre, Civil Section 2716, pp. 435-436; nor can a party advance new theories or issues in order to secure a reversal, and theories or issues which are not apparent or reasonably discernible from the pleadings, affadavit and exhibits, not being considered by the courrt. *Minnehoma Financial Co. v. Pauli*, 565 P. 2d 835 (Wyo. 1977), *Laramie Printing Trustees v. Krueger*, 437P. 2d 856 1968).

I

CONCLUSION

We respectfully submit, therefore, that the Appellants present no substantial question for the decision of the Court, and that the judgment and decree of the Supreme Court of Wyoming should be affirmed.

RESPECTFULLY SUBMITTED,

October, 1978